

Appeal of Charles: W. and Kathleen. E'. Flanagan

Charles: W. Flanagan, hereafter- "appellant", is; a former **federal** civil service **employee** who. receives disability payments from. the: federal government. On appellants ' 1970 joint California personal income tax return, none of the payments, **were** reported as income:. Appellants **excluded** them,,. apparently on the ground that the payments constituted **workmen's** compensation for sickness or personal, injuries sustained. **as** a result of **appellant's** performance of his; duties **as** a **civilian** federal. employee.. Appellants reported as income **on their 1970 state return Mrs. Flanagan's teaching salary, \$9,6 88; interest, \$3,298; dividends, \$1,000; and. \$133 from- private pensions: or annuities..**

Thereafter, they. filed a timely refund claim. for the year **1970**, alleging an. additional right to deduct from that reported: **income \$5,200. of** the. federal dis-ability **payments.** **Respondent** denied the refund, claim. and appellant then brought this: timely **appeal.**

Appellant contends that as a totally and permanently disabled **former** federal employee he is entitled to deduct that amount as **excludable** sick pay.. The right to this deduction **is** asserted even though none of **the** disability payments were **included** in reported gross income'. Appellant **relies upon the rule that taxpayers** retired on disability can apply the **statutory sick pay** exclusion to their disability retirement payments: until they reach the age of mandatory retirement, (See Treas. Reg., § 1.105-4 (3). (i) ; T.I.R. 1283, April 9, 1974.)

Turning to the pertinent **statutory** provisions, section 17138, subdivision (a)(1), of the Revenue and Taxation Code, provides for the exclusion from gross income of amounts received under workmen's, compensation acts as compensation for sickness or personal injuries. **Pursuant** to section **17139 thereof**, amounts received by an employee under an accident or health plan, or insurance, for personal injuries or sickness (where the amounts are attributable to nontaxable contributions by the employer, or paid by the employer) are not included in gross income if such amounts constitute payments in lieu of wages for a period

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during which the employee is absent from work-on account of personal injuries or sickness. This entirely separate exclusion, however, may not exceed a weekly rate of \$100. (Rev. & Tax. Code, § 17139, subd. (d).) The same exclusions are provided for under federal law. (See Int. Rev. Code of 1954, §§ 104, 105.)

Consequently, workmen's compensation is totally excludable and sick pay is excludable within certain limits. Taxpayers who are retired on disability prior to mandatory retirement age can apply the latter exclusion to disability retirement payments until they reach the age of mandatory retirement. (Treas. Reg., § 1.105-4, (3)(i), supra; T.I.R. 1283, supra.)

Proceeding upon the premise, as the parties have also done, that the payments at issue constituted federal workmen's compensation benefits, we first note that appellants properly excluded all of them from gross income. (Rev. & Tax. Code, § 17138, subd. (a).) Appellants, however, by pursuing this refund claim, are, in effect, seeking to deduct the **payments** from income twice, i.e., additionally under the sick pay exclusion to the extent of the amount of \$5,200, as disability retirement payments. The payments, however, have already been totally excluded as workmen's compensation. **It is elementary that appellants are not entitled to a second deduction for the identical payments.**^{1/} There simply is no such authority under the pertinent state statutory provisions. The payments were either workmen's compensation, wholly excludable, or disability retirement benefits (sick pay), partially excludable.

^{1/} Federal- (5 U.S.C., §§ 8101-8150) provides for workmen's compensation for federal employees injured in the performance of their duties. Federal law (5 U.S.C., § 8337) also provides for disability retirement payments for federal employees. If the disabling injury or illness is sustained in the performance of duties as a federal employee, the employee may choose the greater benefit to which he is entitled. (5 U.S.C., §§ 8116, 8337.)

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In support of the claim for refund, appellant also asserts that he received a refund from the federal government for the year 1970 of federal income tax on the ground that the payments constituted excludable sick pay. However, it must be noted that there also is no basis for any "double deduction" under the comparable federal statutory provisions. We do not know the underlying circumstances concerning any such federal refund, including what was reported as income on the 1970 federal return, or on an amended return, and the specific reasons for any such refund. In any event, appellants are simply not entitled to deduct such payments twice under either federal or state law.

For the foregoing reasons, we conclude that the action of the Franchise Tax Board must be sustained.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

